

No. 16,448

United States Court of Appeals

For the Ninth Circuit

GREGORIO ARCIAGA MESINA,
Appellant,

vs.

GEORGE K. ROSENBERG, Director of Im-
migration and Naturalization,
Appellee.

Appeal from the United States District Court for the
Southern District of California,
Central Division.

APPELLANT'S PETITION FOR REHEARING
BEFORE THE COURT SITTING EN BANC.

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*To the Honorable Richard H. Chambers, Oliver D.
Hamlin, Jr., C. JJ., and William Jameson, D. J.,
Judges of the United States Court of Appeals for
the Ninth Circuit:*

Appellant Gregorio A. Mesina respectfully asks that a rehearing in the above case be ordered before the Court of Appeals of the Ninth Circuit sitting en banc. A rehearing en banc should be granted because there is now an intra-circuit conflict as to the effective date of the Philippine Independence Act, 48 Stats. at L. 456, on which the decisions are evenly divided, 2-2. We give the authorities holding (1) that a rehearing en banc is a proper remedy for this situation and (2) that

the arguments of the present opinion do not give it any logical preference over the two contrary holdings.

1. REHEARING EN BANC PROPER TO RESOLVE
INTRA-CIRCUIT CONFLICT.

A. (1) The United States Supreme Court has said that it is the function of the Circuits to resolve intra-circuit conflicts. *Wisniewski v. U.S.*, 353 U.S. 901, 902.

(2) The United States Supreme Court has also said that a rehearing en banc may be proper even where the panel does not doubt the correctness of its decision.

Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247,

(p. 262.) "Finally, it is essential to recognize that the question of whether a cause should be heard en banc is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division. The three judges who decide an appeal may be satisfied as to the correctness of their decision. Yet upon reflection after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attendance of the full court."

B. The Ninth Circuit has held an intra-circuit conflict to be one of the situations calling for a rehearing before the Court of Appeals en banc:

Western Pac. R. R. Corp. v. Western Pac. R. R. Co., 206 F.2d 495, 496.

"It has been the policy of the Court to avoid the duplication of effort, and frustration, delays and

expense to litigants incident to such anomalous procedure *except in situations of a very limited class, namely those in which intra-circuit conflicts appear to have developed*³ . . .”

³(citing) *Hopper v. U. S.*, 142 F.2d 181; *So. Pac. v. Guthrie*, 180 F.2d 295, *id.* 186 F.2d 926.

2. THE PRESENT OPINION ADVANCES NO GROUNDS FOR PREFERENCE OVER OPPOSITE VIEW.

A. As the present opinion recognizes, the previous decisions of this Circuit were 2-1 in favor of fixing the effective date of the Philippine Independence Act (48 Stats. at L.456) at May 14, 1935. With the present decision, the vote now stands at 2-2.

(1) The present opinion mentions the language in *Rabang v. Boyd*, 353 U.S. 427, 431, that the power to exclude Filipinos was exercised “for the period from 1934 to 1946”. This decision does not even refer to the effective date as such of the Philippine Independence Act. Summaries of the briefs in the case appear at 1 L.Ed.2d, 2109-2111. The point was not briefed by the deportee. The Court’s remarks seem to be based on the reference in the government’s brief (1 L.Ed.2d 2111, last par.)—which in turn cites two decisions of this Court, *Gonzales v. Barber*, 207 F.2d 398 and *Mangaoang v. Boyd*, 205 F.2d 553. *Gonzales v. Barber*, 207 F.2d 398, does not touch the point, and *Mangaoang v. Boyd*, 205 F.2d 553 is the other way (as the present opinion recognizes). The present opinion “adhere[s] to the holding of this Court in

Cabebe v. Acheson, 183 F.2d 795, 799” and quotes from the Presidential proclamation of July 4, 1946, 60 Stats. at L.1353. It states as to the two contrary holdings (*Del Guercio v. Gabot*, 161 F. 2d 559; *Mangoang v. Boyd*, 205 F.2d 553) that—“In neither case was a determination of the effective date necessary to the decision”.

(2) *But this was equally true for Cabebe v. Acheson*, 183 F. 2d 795, and applies effectively to the Presidential proclamation of July 4, 1946 (60 Stats. at L.1353). In no instance was the effective date of the Act important to what was being done. (The informal interpretation of the Philippine Independence Act (37 Ops. Atty. Gen. 115) noted in footnote 16 of the opinion, was delivered Feb. 13, 1933, so undoubtedly refers to the (subsequently rejected) Act of Jan. 17, 1933, 47 Stats. at L.761, and not to the Act now under consideration). Consequently, the reasons which the present opinion gives for adopting the authorities fixing May 1, 1934 as the effective date, *apply equally to the holdings on both sides of the question.*

B. On the other hand the present opinion does not mention the significance of the last paragraph of Section 4 of the Act (48 Stats. at L.456) which provides that everything shall revert to its previous status if the *constitution* should be rejected. This could have produced highly anomalous results if the date of acceptance of the Act be taken as earlier than the date of acceptance of the Constitution.

3. IMPORTANCE OF DATE HERE.

By implication, the opinion follows the previous decision in *Mangoang v. Boyd*, 205 F.2d 553, that under the statutes involved here, a Filipino is deportable only for *acts committed when he was no longer an American national*. If the acts charged in 1934 did not satisfy this requirement there was then no authority to deport.

4. CONCLUSION.

This is the fourth time that this Court has been faced with the question of the effective date of the Philippine Independence Act. The question is an important one which keeps recurring.

The four cases have produced two holdings each way.

The situation is clearly one where a hearing en banc should be ordered to settle the law for the Circuit.

Dated, San Francisco, California,

May 1, 1960.

Respectfully submitted,

NORMAN STILLER,

GEORGE OLSHAUSEN,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
May 1, 1960.

GEORGE OLSHAUSEN,
*Of Counsel for Appellant
and Petitioner.*